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In the Supreme Court of the United States

OCTOBER TERM 1996

SANDRA JEAN DALE BOGGS,
Petitioner

VERSUS

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., preempts states' community property laws that afford an inheritance right, to heirs of a predeceased non-employee spouse of the pension plan participant, to recover ERISA covered pension plan benefits from the participant's estate and surviving spouse.

II.

Does ERISA preemption of states' laws extend to pension benefits 'rolled over' into an Individual Retirement Account under 26 U.S.C. 401, et seq.?

LIST OF PARTIES

The parties to this case are the petitioner, Sandra Jean Dale Boggs and respondents, Thomas F. Boggs, Harry M. Boggs and David B. Boggs.

TABLE OF CONTENTS

Page

Questions Presented for Review.....i

List of Parties.....ii

Table of Contents.....iii

Index to Appendicies.....iii

Table of Authorities.....v

Opinions Below.....1

Jurisdiction.....1

Statutes Involved.....2

Statement of the Case.....3

Reasons for Granting Writ of Certiorari.....6

i. Conflict Exists Within the Circuits on the Breadth of the Pre-emption and Spendthrift Clauses of ERISA.....8

II. The Fifth Circuit's Decision is in Direct Conflict with Decisions of this Court in Related Areas.....12

TABLE OF CONTENTS (continued)

Page

III. The Fifth Circuit Erroneously Ignored the Provisions of ERISA's Preemption of State Laws As Applied to 26 U.S.C. 401 et seq., The IRA Account.....15

Conclusion.....16

APPENDIX

Appendix A Opinion of the United States District Court for the Eastern District of Louisiana.....A-1

Judgment Of The United States District Court for the Eastern District of Louisiana.....A-12

Appendix B Opinion of the United States Court of Appeals for the Fifth Circuit.....A-13

Appendix C 26 U.S.C. 408(a) and (g).....A-26

Appendix D 29 U.S.C.§1055(a), (b), (d), and (e).....A-27

29 U.S.C. §1056(d).....A-28

29 U.S.C. §1132(a) and (e).....A-29

29 U.S.C. §1144(a), and (c).....A-31

TABLE OF CONTENTS (continued)

Page

Appendix E Louisiana Civil Code, Article 538.....A-32

Louisiana Civil Code, Article 890.....A-32

Louisiana Civil Code, Article 2335.....A-33

Louisiana Civil Code, Article 2336.....A-33

Louisiana Civil Code, Article 2338.....A-33

Louisiana Civil Code, Article 2369.....A-34

Appendix F United States Department of Labor, DOL Advisory Opinion #90-46A (December 4 1990).....A-35

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES

ERISA, Section 205....11
ERISA, Section 206(d) (1)....11
ERISA, Section 514(a)....2
26 U.S.C. 408....2,6,15
26 U.S.C. 408(a)....15
28 U.S.C. 1254(1)....1
29 U.S.C. 1055....2
29 U.S.C. 1056(d) (1)....5,9
29 U.S.C. 1132(a) (1)....2,3
29 U.S.C. 1132(e) (1)....2,3
29 U.S.C. 1144(a)....2,8,11

STATE STATUTES

La. Civil Code, Article 538....2,10
La. Civil Code, Article 890....2,6,10
La. Civil Code, Article 2336....2,6,10
La. Civil Code, Article 2338....2,6,10
La. Civil Code, Art. 2369....2,6

TABLE OF AUTHORITIES (continued)

FEDERAL CASES

Page

Ablamis v. Roper, 937 F.2d 1450 (9th Cir. 1991)....5,8,9,11

Boggs v. Boggs, 849 F.Supp. 462 (E.D. La. 1994)....4

Boggs v. Boggs, 82 F.3d 90 (5th Cir. 1996)....4

Free v. Bland, 369 U.S. 663 (1962)....13,14

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)....13,14

Hook v. Morrison Miling Co., 38 F.3d 776 (5th Cir. 1994)....12

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988)....11,12

Rossell v. Security Services, Inc., 38 F.3d 819 (5th Cir. 1994)....12

Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456 (5th Cir. 1986)....12

Wissner v. Wissner, 338 U.S. 655 (1950)....13,14

STATE CASES

Hare v. Hodgins, 586 So. 2d 118 (La. 1991)....4

Succession of Egan, 543 So.2d 940 (La. App. 5 Cir. 1989)....6

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sandra Jean Dale Boggs ("Sandra"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above action on April 17, 1996.

*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 82 F.3d 90 (5th Cir. 1996) and is reprinted in the Appendix ("App.") of this certiorari petition at App. 13-25. The opinion of the United States District Court for the Eastern District of Louisiana denying petitioner's Motion for Declaratory Judgment is reported at 849 F.Supp. 462 (E.D.La. 1994) and is reprinted at App. 1-12.

*

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on April 17, 1996. This Petition for a Writ of Certiorari has been filed with the clerk of this Court within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. sec 1254 (1).

*

STATUTES INVOLVED

The relevant federal statutory provisions are:

Employee Retirement Income Security Act of 1974 ("ERISA"): § 514(a), (29 U.S.C. §1144(a)), §205 (29 U.S.C. §1055, §206(d)(1)(29 U.S.C. §1056(d)(1)), 29 U.S.C. §1132(a)(1), 29 U.S.C. §1132(e)(1), and

Internal Revenue Code, 26 U.S.C. §408 (Individual Retirement Account), the pertinent parts of which are reproduced in the Appendix hereto.

The relevant Louisiana statutory provisions are Louisiana Civil Code, Articles 538, 890, 2336, 2338, 2341, 2349, and 890, which are reproduced in the Appendix hereto.

*

STATEMENT OF THE CASE

Petitioner, Sandra Boggs ("Sandra") is the widow of Isaac Boggs ("Isaac"), an employee of South Central Bell. As an employee he participated in an ERISA-qualified pension plan. Isaac was married twice, first to Dorothy Boggs ("Dorothy"), who died in 1979, they being the parents of three sons, David Boggs, Thomas Boggs and Harry Boggs, the respondents herein, and second, to petitioner, Sandra. Isaac died in 1989.

In 1985 Isaac retired and became entitled to ERISA pension benefits. Upon his retirement, Isaac received a lump sum pension payment which he rolled over into an IRA account,

and a monthly annuity which was converted into a survivors annuity upon his death and is currently paid to petitioner, Sandra.

Dorothy, Isaac's first wife, who died in 1979, bequeathed by testament one-third of her estate and a lifetime usufruct in the remaining two-thirds to her surviving husband, Isaac. She also bequeathed the naked ownership, or reversionary interest, in the two-thirds of the estate subject to the usufruct to her three sons, respondents herein. Listed as one of the assets in Dorothy's estate as community property was an interest in Isaac's pension plan.

Two of the Boggs' sons filed an action in Louisiana state court seeking an accounting of their father's usufruct and an award of their deceased mother's community portion of the pension plan benefits.

Sandra then filed this action in federal court, under 29 U.S.C. § 1132(a)(1), and (e)(1), against the three Boggs' sons, seeking a declaratory judgment that: (a) the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under the plan and the IRA, (b) the community existing between Isaac and his first wife, Dorothy, had no interest in the assets or benefits payable under the pension plan or the IRA, and thus, (c) the three Boggs sons as testamentary heirs of their mother, Dorothy, and as forced heirs of their father, Isaac, have no interest in plan assets, or benefits, nor do they have a claim against petitoner, Sandra, individually or as executrix of the Succession of Isaac Boggs, for any portion of the value of such plan assets or benefits.

The district court held that ERISA does not preempt Louisiana's community property law: "Application of Louisiana's community property law in this case will not do major damage to any federal interest, and thus, the Supremacy Clause does not require that the state law be overridden." *Boggs v. Boggs,* 849 F.Supp. 462, 466 (E.D. La. 1994).

The Fifth Circuit affirmed the district court, holding that: "The broad sweep of the ERISA preemption provision, however, is not without limits *** it preempts only state laws which relate to a benefit plan." (82 F.3d at p.95) It found that when the state law " 'involves an exercise of traditional state authority' ", there is no preemption because the " 'area of domestic relations has long been the domain of the states'." (82 F.3d at pp. 95,96) It then reasoned that:

> "Under Louisiana community property law, each spouse owns 'a present undivided one-half interest' in all community asssets, which vest from the moment of acquisition. Pension benefits, if acquired during the marriage, are generally considered a community asset. Thus, if one spouse receives benefits from a pension plan, he or she must account to the other spouse for this benefit which vests equally in both spouses from the instant of acquisition." (Citing Hare v. Hodgins, 586 So.2d 118, 122 (La. 1991) (83 F.3d at p. 96).

The court rejected petitioner's contention that ERISA preempts the community property system by holding that such laws do not sufficiently relate to ERISA to trigger preemption, because state property laws only affect what the beneficiary does with the benefits "after they are received". (82 F.3d at p. 96) It rejected petitioner's reliance on ERISA's

spendthrift provision which prohibits the assignment or alienation of plan benefits (29 U.S.C. §1056(d)(1)). The court stated that provision is designed to prevent plan participants from "recklessly divesting themselves of plan benefits before retirement" (82 F.3d at p.97) and does not prevent the recognition of third party claims based on state community property laws under which "ownership vests immediately in the non-earning spouse and no transaction is needed to convey ownership". (82 F.3d at p.97) Consequently, the Fifth Circuit concluded:

> "Dorothy Boggs held an ownership right in the pension. Her spouse, or his estate, owes her an obligation to account for her share of the pension. Once her estate received this benefit, her will operates to transfer ownership to her three sons." (82 F.3d at p. 97)

The Fifth Circuit specifically rejected the contrary decision in *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991), wherein the Ninth Circuit held that California's community property law *is* preempted by ERISA. The Fifth Circuit said:

> "The plaintiff asks this Court to adopt the reasoning of the *Albamis* court and hold that ERISA preempts Louisiana community property law. We cannot adopt the reasoning of the Ninth Circuit Court because we feel their preemption analysis placed too much emphasis on a broad interpretation of the spendthrift provision." (82 F.3d at p. 98)

As regards the portion of Isaac's pension plan benefits

which were rolled over into an IRA, the Fifth Circuit found that 26 U.S.C. 408, governing IRA's, only "governs the trust relationship between the government and the participant,***" and "*** does not affect that participant's later obligation to his spouse to account for her portion of the pension benefits," (82 F.3d at p.98). Thus the court ruled:

> "This provision governing the disbursement of IRA funds cannot reasonable be interpreted to intervene in the marital relationship and divest one spouse of ownership rights." (82 F.3d at p.98)

As a result of the Fifth Circuit's rejection of Sandra's position, the Boggs' sons may proceed with their state court action in which they have sought (1) an accounting from Sandra of all of the pension payments paid during the lifetime of the employee, Isaac,[1] (2) an accounting of Dorothy's and Isaac's community interest in the survivor annuity payments which have been paid to petitioner, Sandra, since the death of Isaac,[2] and, (3) Dorothy's community interest in the lump sum distribution paid to Isaac upon his retirement[3], which lump sum distribution was "rolled over" into an Individual Retirement Account (IRA) prior to Isaac's death.[4]

REASONS FOR GRANTING WRIT OF CERTIORARI

Millions of American workers are participants in

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[1] La. Civil Code, Art. 890 and Art. 890.1, App. P. A-32

[2] La. Civil Code, Art. 2369, App. P. A-34

[3] Louisiana Civil Code, Articles 2336 and 2338. App. A-33

[4] *Succession of Egan*, 543 So.2d 940 (La. App. 5 Cir. 1989)

private pension plans earned while working in one or several of the states; these pension plans are designed to provide a measure of financial security for the participant's retirement years and are, thus, subject to federal regulation under ERISA. The stated purpose of ERISA is the uniform administration of all pension plans covered by the Act. In order to ensure the consistent and uniform application of ERISA's terms, Congress provided for "preemption of all state laws" that relate to ERISA covered plans and prohibited assignment or alienation of the participant's pension benefits. If the purpose of ERISA is to provide uniform administration of pension plans and uniform distribution of plan benefits, recognition of claims to those benefits based on any law other than ERISA defeats the twin purposes of uniformity and security that participants and annuitants expect and anticipate, as well as the certainty administrators require in determining who will be entitled to benefits.

In the Fifth Circuit, however, ERISA protected pension plans are preempted by states' community property laws which vest ownership to a portion of the plan assets in the non-employed spouse, thus affording her the right to dispose of her share by testament to third parties.

On the other hand, in the Ninth Circuit: "Permitting a non-employee spouse to bequeath one-half of a surviving employee's pension benefits to a third party would do 'major damage'***." (937 F.2d at pp. 1459-1460) That court correctly recognized that ERISA does preempt states' community property laws.

The United States Department of Labor, at the invitation of the Fifth Circuit, filed a brief as *amicus curiae* in the

appellate court in which it wrote a detailed and comprehensive analysis of the relationship between the preemption and anti-alienation clauses and their application to this case. Although the court rejected the United States' argument, the dissent of Judge King praised the United States' analysis as the preferred approach to the case and referred to an advisory opinion letter from the U. S. Department of Labor, which we have reproduced as App. P. A-35.

1. Conflict Exists Within the Circuits on the Breadth of the Pre-emption and Spendthrift Clauses of ERISA.

There is a direct conflict between the decision of the Fifth Circuit in this case and the Ninth Circuit decision in *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991). That conflict concerns an important question of national significance: Does the preemption clause of ERISA (29 U.S.C. sec. 1144(a), preempt state community property and inheritance laws that enforce rights of the heirs of the predeceased non-employee spouse against the estate of the participant and the participant's surviving spouse, or are such participant's pension benefits and the participant's surviving spouse's annuity protectd by ERISA from such claims?

In the Ninth Circuit, the participant's pension benefits are not subject to community property claims by the non-participant spouse's heirs, nor testamentary disposition by the non-participant spouse, whereas in the Fifth Circuit, the participant's pension benefits are subject to community property claims by the non-participant spouse's heirs, and testamentary disposition by the non-participant spouse. Unless this Court resolves this conflict, participants in ERISA

covered pension plans, and their spouses, will be faced with uncertainty and conflicting results depending upon the participant's domicile. Moreover, because many workers move from state to state during their working careers, it is essential that one law apply to pension benefits, rather than the many different states' laws. Thus, this split between the Circuits creates a significant and substantial national problem concerning the application of ERISA.

(a.) The Ninth Circuit's result is preferable to that of the Fifth Circuit.

In *Ablamis* the court did not consider the application of community property law to the pension benefits, because ERISA prevents the application of any state law that attempts to alienate the pension benefits. Therefore, the Ninth Circuit reasoned that the recognition and enforcement of testamentary claims by the heirs of the non-paticipant spouse constitute an impermissible alienation of the participant's benefits. The Ninth Circuit never decided the point whether or not the pension benefit fell into the community. Rather, the court focused on ERISA's non-alienation provision and concluded that "To the extent that state community property laws permit such transfers, they are preempted by section 1056(d) *** there is no reason to allow a predeceased non-employee spouse to leave part of her surviving employee spouse's pension to a friend, lover or relative." (937 F.2d at p. 1457). The court went on to say: "Congress intended to prohibit non-employee spouses from making such bequests." (937 F.2d at p.1458).

The Fifth Circuit, however, avoided direct confrontation with ERISA's anti-alienation provisions by finding that

community property laws create a *present vested ownership interest*[5] in the non-participant spouse in the employee's pension benefits which can be devised by testament to persons other than ERISA named beneficiaries. Thus, that court holds that such disposition of the benefits is a disposition of community property[6], rather than a dispositon of plan benefits, and therefore, does not 'relate to' the pension plan, because the Fifth Circuit reasons that community property laws have taken the benefits out from under ERISA's protection and vested ownership equally in the spouses. Only the result reached by the Ninth Circuit will solve the dilemma created by the Fifth Circuit's championing states' property laws in preference to preemption and non-alienation requirements of ERISA.

(b) The Fifth Circuit's Decision Is Not Well Founded.

It is submitted that the Fifth Circuit was in error in holding that testamentary disposition of community property does not 'relate to' the ERISA pension plan. To the contrary, Louisiana state law *does* "relate to" ERISA covered pension plans, because it attempts to define rights in the same persons to the same property that ERISA covers. Louisiana Civil Code, Article 890 provides for a usufruct in favor of a surviving spouse of all former community property inherited by the children of the marriage, and Article 538 provides for the payment of the principal consumed by the usufructuary to the naked owners at the termination of the usufruct. In this case the respondents are seeking payment from Sandra of a sum of money representing that portion of the pension

[5] La. Civil Code, Article 2336, App. P. A-33, is the source of this holding.

[6] La. Civil Code, Article 2338, App. P. A-33, is the source of this holding.

plan benefits attributable to the community assets between Dorothy and Isaac. Section 205 of ERISA provides that qualified benefits *shall* be paid to the participant, or the participant's surviving spouse, except in cases where spousal consent has been obtained in the naming of a beneficiary or where a qualified domestic relations order provides for an alternate beneficiary. Because state laws change the classes of protected persons under §205 and §206, and accord rights of ownership to persons outside of the ERISA designated classes of protected persons, it is submitted that, as in *Ablamis*, the Louisiana community property law is preempted by ERISA under 29 U.S.C. 1144(a), and thus the decision of the Fifth Circuit is in error.

The Fifth Circuit stated that it would not find preemption of 'traditional' areas of domestic relations law, and further, the suit between the participant's surviving spouse and the heirs of the participant's deceased first spouse is too remote to relate to ERISA covered pension plans to justify preemption of the state law. It reasoned that Louisiana' community property laws constitute a traditional state concern so that they survive preemption if they do not do 'major damage' to an area of federal concern, and further, that they affect ERISA in too remote a fashion to be considered "relating to" an ERISA plan, because a judgment in favor of the heirs of the nonparticipant spouse against an annuitant or participant does not involve the administration of plans. The court sought to justify that conclusion by attempting to create a distinction between the "plans" and the "proceeds of the plan": "Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary. This is no greater effect than the state's garnishment laws. *Mackey*, 486 U.S. 825, 108 S.Ct.

2183, 100 L.Ed.2d 836 (1988)." (82 F.3d at p. 3228). It is submitted that separating the "plan" from the "proceeds" is a distinction without a difference which will not support the Fifth Circuit's conclusion. Moreover, the Fifth Circuit's reliance on *Mackey* is misplaced. Welfare benefits, considered in *Mackey*, were not protected by the spendthrift clause, as are pension benefits; the Georgia general garnishment law did not relate to an ERISA governed right because ERISA did not create the obligation sought to be enforced nor determine the amount of that obligation. The general garnishment law did not interfere with or change the employee's entitlement to the benefits in question, it only allowed the creditor to attach that portion of the matured benefit necesssary to satisfy the employees' obligation. The garnishment laws do not control the ownership of employee pension benefits, whereas the community property laws do.

Likewise, the Fifth Circuit's reliance on its prior decisions in *Hook v. Morrison Milling Company,* 38 F.3d 776 (5th Cir. 1994), *Rozzell v. Security Services, Inc.,* 38 F.3d 819 (5th Cir. 1994) and *Sommers Drug Stores v. Corrigan Enterprises, Inc.,* 793 F.2d 1456 (5th Cir. 1986), fails to support its holding, because these cases all deal with general state laws that do not rely on or relate to an ERISA created obligation. The state negligence or fiduciary law in each of these cases had no effect on the ERISA plan, and the violation of these laws by the employer did not alter the employee's relation to the ERISA plan.

II. The Fifth Circuit's Decision Is In Direct Conflict With Decisions Of This Court In Related Areas.

The Fifth Circuit's holding in this case is contrary to

a line of United States Supreme Court cases involving the conflict between federal law and community property laws. Among those cases are: *Wissner v. Wissner,* 338 U.S. 655 (1950) (militry life insurance program); *Free v. Bland,* 369 U. S. 663 (1962) (U.S. Savings Bonds survivorship provision); and *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979) (railroad retirement benefits). In each of those cases, this Court held that, where Congress has provided a comprehensive system for a particular purpose, whether railroad workers retirement or military personnel retirement, or savings bonds sales, community property laws awarding a non-participant spouse rights in the federally controlled program will not be recognized, except where specifically allowed by statute.

If the respondents are allowed to pursue their accounting action against the beneficiary, petitioner herein, Louisiana community property law will award them an amount equivalent to their mother's community interest in the benefits earned during her marriage to Isaac. This award will be against the beneficiary, and not directly against the plan, which all parties agree is not subject to garnishment.

In each of the above cited cases, this Court has found that such an offsetting award or recognition of a community property interest in the employee's benefits would do 'major damage' to a federal purpose.

> "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. ***" *Hisquierdo v. Hisquierdo,* 439 U. S. at p. 588

According to *Hisquierdo, Free* and *Wissner,* granting the "offsetting award", for the monetary equivalent of a portion of the employee's pension benefits, deprives the plan participant or his beneficiary of the plan benefits and thwarts the federally created protection envisioned by Congress.

Petitioner further submits that the Fifth Circuit failed to complete the analysis of the case at bar based on the test outlined in *Free v. Bland,* 369 U.S. 663 (1962). In *Free* this Court would not accept the fiction that a state law based judgment of ownership is permissible to dispossess the named beneficiary of federally created rights in U.S. Savings Bonds. The claim in *Free* was the same as here, except that the object of the claim was U.S. Savings Bonds rather than pension plan benefits. Federal law designated the beneficiary and established the order in which the benefits passed from person to person. The Texas Supreme Court in *Free* applied Texas community property laws to circumvent the federal scheme by giving judgment to the heirs of the predeceased spouse of the bond owner against the named beneficiary. This Court struck down that decision and succinctly stated the test:

> "If the state can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the state has interfered directly with legitimate exercise of the power of the Federal Government to borrow money." (369 U. S. at p. 669)

In the instant case the Fifth Circuit has created a fiction that ignores the federally created rights of the participant and the participant's surviving spouse in favor of the

heirs of the nonparticipant spouse. This result is achieved through the 'simple expedient' of the state community property laws and should not be permitted by this Court.

The major federal purpose of ERISA is maintaining the employee's financial security through a guaranteed income stream during retirement, and income to the employee's surviving spouse, the petitioner herein. Although it is reasonable to assume that Congress anticipated that many state laws would escape preemption, Congress clearly anticipated that ERISA would preempt state laws relating to entitlement to the covered benefits.

III. The Fifth Circuit Erroneously Ignored the Provisions of ERISA's Preemption of State Laws As Applied to 26 U.S.C. 401 et seq. And the IRA Account.

In this case, Isaac rolled over the lump sum distribution from his ERISA covered pension plan into an IRA at the time of his retirement, and this Court should hold that the funds derived from the ERISA plan are not subject to state laws of ownership, for the same reasons the participant's annuity and the surviving spouse's annuity are not subject to state law. The Individual Retirement Account Act, 26 U.S.C. 408, specifically states that the IRA account is "for the exclusive benefit of the individual or his beneficiaries" (26 U.S.C. 408(a) and "shall be applied without regard to any community property laws" (Id., sec. (g))

CONCLUSION

The community property laws, and the marital property laws of the non-community property states, are the types of laws that Congress intended to preempt by ERISA in order to provide a uniform and certain pension benefit law.

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: July 10, 1996, Mandeville, Louisiana.

Respectfully submitted,

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APPENDIX A

MINUTE ENTRY
McNAMARA, J.
MARCH 9, 1994

FILED
MAR 10 '94

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SANDRA JEAN BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

This is a declaratory judgment action wherein Plaintiff seeks to have this court declare that ERISA, 29 U.S.C. § 1001 *et seq.* preempts Louisiana's community property laws. After Plaintiff filed her Motion for Summary Judgment, the parties informed the court that there were no genuine issues of material fact and that this entire matter should be tried on stipulated facts. Having carefully reviewed the stipulated facts, the arguments of counsel and the applicable law, the court renders the following decision.

I. *FACTS*

Issac Boggs, Jr. was married to his first wife, Dorothy McDonald Boggs, from the date of his employment with South Central Bell on June 18, 1949 until her death on August 14,

DATE OF ENTRY MAR 10 1994

1979. During their marriage, Isaac and Dorothy Boggs had three sons; Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, who are the Defendants in this case. Pursuant to Dorothy Boggs' will, Isaac Boggs, Jr. received one-third of her estate and the lifetime usufruct of the remaining two-thirds of the estate, whose naked ownership was inherited by Defendants. The Sworn Descriptive List of assets filed in Dorothy Boggs' succession included the Bell System Savings Plan for Salaried Employees with a value of $42,388.57 at the time of her death, with her one-half interest valued at $21,194.29.

Isaac Boggs, Jr. married Plaintiff, Sandra Boggs, on April 5, 1980, and no children were born of this marriage. Isaac Boggs, Jr. retired from South Central Bell after 36 years of service on September 1, 1995. Upon his retirement, Isaac Boggs, Jr. received $151,628.94 which was the distribution from the BellSouth Management Savings Plan (formerly called BellSouth Systems Savings Plan for Salaried Employees). The entirety of these funds were "rolled over" into an IRA account at Delaware Charter Guarantee Trust Company. Isaac Boggs, Jr. made no withdrawals from the IRA account prior to his death on February 16, 1989, at which time the IRA account was valued at $180,778.05. In addition to the distribution from the Savings Plan, Isaac Boggs, Jr. received monthly retirement payments from September 1, 1985, through the date of his death on February 16, 1989, in the amount of $1,777.67 per month. Thereafter, the survivor's lifetime annuity pension has been paid to Plaintiff, and she was the named beneficiary of the IRA plan.

Under the terms of the BellSouth ESOP, Isaac Boggs, Jr. acquired 96 shares of AT&T stock which were distributed

to him when he retired. In addition, the Plan included life insurance policies payable to Plaintiff as the named beneficiary. The BellSouth Management Savings Plan, the ESOP Plan, and all retirement benefits and employee benefit plans of South Central Bell are qualified plans subject to the provisions of The Employee Retirement Income Security Act of 1974 and the Retirement Equity Act of 1984, 29 U.S.C. § 1001, *et seq.* The IRA account at Delaware is a qualified Individual Retirement Account under IRC Section 401, *et* seq.

Two of the Defendants herein, Harry and David Boggs, have filed an action in state court claiming that they are entitled to the following:

1. An accounting of the usufruct enjoyed by Isaac Boggs, Jr. over that portion of the retirement payments attributable to Dorothy Boggs' community interest in the retirement plan and the payment of a percentage of the pension plan payments from September 1, 1985 through February 16, 1989;

2. A percentage of the survivors' annuity payable to Sandra Boggs from February of 1989 until her death;

3. A percentage of the IRA account which was created in the "roll over" of Isaac Boggs, Jr.'s distribution of the BellSouth Management Savings Plan, based on Dorothy Boggs' community interest in those funds; and

4. A portion of the ESOP shares of AT&T stock.

On December 17, 1992, Plaintiff filed her Complaint for

Declaratory Judgment seeking a ruling that ERISA preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under, the plan and/or the IRA.

II. *ANALYSIS*

Louisiana is in the minority of states that provide for a comunity property regime among spouses where "[e]ach spouses owns a present undivided one-half interest in the community property." La. Civ. Code Ann. art. 2336 (West 1994). Under Louisiana's community property regime, a non-employee spouse is granted a right to claim pension and survivorship benefits even if such do not become payable until after the community is dissolved as long as both the pension and the community coexist for some period of time. *T.L. James & Co. v. Montgomery,* 332 So.2d 834 (La. 1975) and *Sims v. Sims,* 358 So.2d 919 (La. 1978). The Court's reasoning in these two cases was that the future pension right, which was being built up during the existence of the community, constituted "an incorporeal, movable right" and had to be so classified at the dissolution of the community. *T.L. James & Co.,* 332 So.2d at 851. Under Louisiana law, therefore, Dorothy Boggs owned a substantial interest in the pension and retirement plans of Isaac Boggs, Jr. because she was married to him during thirty of the thirty-six years that he was employed with South Central Bell.

While Plaintiff does not refute that Louisiana's community property laws operate as described above, Plaintiff argues that ERISA preempts state community property law. Plaintiff's preemption argument relies upon a single provision of ERISA. Specifically, Plaintiff contends that section

514(a) of ERISA, 29 U.S.C. § 1144(a) (1976), explicitly preempts the state law at issue. Section 514(a) provides that ERISA "shall supersede any and all state laws insofar as they . . . relate to any employee benefit plan. . . ." After carefully considering the arguments of counsel and the applicable law, the court finds that ERISA does not preempt Louisiana's community property law.[1]

While there is no question that the Supremacy Clause gives Congress the power to preempt state laws, both Congress and the courts have traditionally deferred to state property law because of the strong state interest in determining the nature of property rights. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979). The courts have, however, recognized that ERISA broadly preempts state law because Congress

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[1] Although Plaintiff did not argue that section 206(d) (1) of ERISA, 29 U.S.C. § 1056(d) (1) (1976), preempts Louisiana's community property law, this court, for purposes of completeness, will consider whether this section supersedes the state law at issue herein. Section 206(d) (1) provides that "[e]ach pension shall provide that benefits provided under the plan may not be assigned or alienated." This court finds, however, that there are two reasons why ERISA's anti-alienation provision does not operate to preempt Louisiana's community property law.

First, Congress proscribed alienation and assignment of pension benefits to protect an employee from his own financial improvidence in dealing with third parties, and Congress did not intend to alter traditional familial and support obligations. *Savings and Profit Sharing Fund of Sears Employees v. Gago,* 717 F.2d 1038, 1041 (7th Cir. 1983) (citing *American Telephone and Telegraph Co. v. Merry,* 592 F.2d 118, 124 (2nd Cir. 1979)). Secondly, "alienate" means "to convey or transfer to another (as title, property, or right): part voluntarily with ownership of." Webster's Third New International Dictionary (1981). By virtue of Louisiana's community property law, Dorothy Boggs' rights in the benefits were acquired by her directly at the outset and did not represent a transfer to her of rights which had previously accrued to Isaac Boggs, Jr. Thus, operation of community property law to the present pension benefits does not constitute an assignment or alienation prohibited by section 205(d) (1).

was primarily concerned with requiring all pension plans to operate under a uniform legal scheme and to eliminate the threat of conflicting state regulation. Note, *Ablamis v. Roper: Preemption of the Nonemployee Spouse's Community Property Rights in ERISA Pension Plans*, 49 Wash. & Lee L. Rev. 1085 (1992) (citing *FMC Corp. v. Holliday*, 111 S.Ct. 403, 408 (1990)). Despite its broad preemption provision, ERISA does not preempt state laws such as Louisiana's community property laws which were not specifically designed to affect ERISA benefit plans. While such state laws may indirectly implicate an ERISA pension plan, they do not "relate to" an employee benefit plan as required to trigger the preemption provisions of section 514(a). *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825, 829 (1988). Instead, ERISA will preempt Louisiana's community property law if and only if: (1) Congress has positively expressed its intent to preempt the state law and (2) the state law does major damage to a clear and substantial federal interest. *Hisquierdo*, 439 U.S. at 808.

Enforcement of Louisiana's community property law simply would not cause "major damage" to any "clear and substantial federal interest" served by ERISA. In enacting ERISA, Congress declared that its policy was the protection of employees vis a vis their employers. 29 U.S.C. § 1001. Not surprisingly, ERISA regulates funding, disclosure, and the vesting of rights in the plans. The Act does not display any particular interest in preserving maximum benefits to any particular beneficiary.

> Although the Act provides a method for the participant to designate a beneficiary, this procedure appears to be another provision for the protection

> of the employee in his relations with his employer and not a federal decision to upset the balance of spousal rights protected by state law.

Employees Savings Plan of Mobil Oil Corp. v. Greer, 535 F.Supp. 1052, 1055 (S.D. N.Y. 1982).

In two cases involving federal pensions, the Supreme Court found that the state domestic relations laws so conflicted with federal objectives that the state laws were preempted. For example, the Court held that state courts could not allocate military retirement pay pursuant to state community property laws upon dissolution of a marriage because such state laws conflicted with the federal military retirement scheme. *McCarty v. McCarty*, 453 U.S. 210 (1981). In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1970), the Court held that pensions under the Railroad Retirement Act of 1974 were not community property subject to division upon dissolution of the marriage because such division would conflict with an allocation of a federal benefit intended by Congress.

These two cases, in which the Court found the requisite damage to federal interests to preempt state property law, differ substantially from the case at hand. In *McCarty*, the Court found that the federal statute providing retirement pay to military officers served major federal goals by providing for the needs of retired officers and by facilitating the management of military personnel by encouraging enlistment, reenlistment, and retirement at an appropriate age. Similarly, in *Hisquierdo*, the Court noted that the Railroad Retirement Act of 1974 created a system of federally administered benefits similar to Social Security. Under this Act, Congress "carefully targeted" the benefits to be provided, consciously

"fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire," and specifically limited the extent to which a divorced spouse may reach these assests. *Hisquierdo,* 439 U.S. at 584-85. Moreover, the present controversy involves privately funded pensions whereas both *McCarty* and *Hisquierdo* actually involved federally funded pensions.

Importantly, the Supeme Court suggested that the Railroad Retirement Act, found to preempt community property law, should be distinguished from ERISA:

> In [the Railroad Retirement Act], Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. *See* Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics.

Id. at 591, n. 24. ERISA merely imposes standards on private administrators of private benefit plans. It does not evince any special concern for preserving all of the benefits of the plans for the participants. Application of Louisiana's community property law in this case will not do major damage to any federal interest, and thus, the Supremacy Clause does not require that the state law be overridden.

The result reached herein is also supported by the Supreme Court's dismissal, for want of a substantial federal question, of the appeal in *Carpenters Pension Trust Fund v. Campa,* 89 Cal. App. 3d 113 (1979), *appeal dismissed,* 444 U.S. 1028 (1980). The effect of a dismissal for want of a substantial federal question is to leave the decision of the lower court undisturbed and "without doubt [to] reject the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley,* 432 U.S. 173 (1977). *See also* 16 C. Wright, A. Miller, E. Cooper & E. Glessman, *Federal Practice and Procedure* § 4014 at 638-39 (1977).

In *Campa,* the state court held that ERISA did not preclude the states from dividing pension rights in marital dissolution proceedings. Significantly, the first question presented to the Supreme Court in *Campa* was:

> 1. Do the provisions of Title I of the Employment Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?

Brief of Appellant at 7. *See also Savings and Profit Sharing Fund of Sears Employees v. Gago,* 717 F.2d 1038, 1043 (7th Cir. 1983). Under the doctrine established in *Mardel v. Bradley,* therefore, the Supreme Court's dismissal of *Campa* for want of a substantial federal question serves as a decision on the merits that the preemption section of ERISA does not override California's community property law. Likewise, this court ascertains no reason why ERISA would premept Louisiana's community property law.

This court notes two additional reasons why ERISA should not preempt state community property law. First, Congress enacted the Retirement Equity Act of 1984 as an amendment to ERISA, in part, as a response to the judicial uncertainty of whether ERISA's bar to the transfer of plan benefits to third parties applied to the apportionment of benefits to a nonemployee spouse pursuant to a divorce settlement. As a result of this amendment, ERISA now specifically grants a divorced nonemployee spouse the right to receive and dispose of benefits awarded in a divorce proceeding but does not explicitly recognize state-created property rights in a married nonemployee spouse. Thus, finding that ERISA preempts state community property law would provide a strong incentive for a nonemployee spouse in a community property state to obtain a divorce before death as the only method of retaining transmissible property rights in the pension. Note, *Ablamis v. Roper: Preemption of the Nonemployee Spouse's Community Property Rights in ERISA Pension Plans,* 49 Wash. 8 Lee L.Rev. 1085 (1992). Secondly, because Louisiana law provided Dorothy Boggs with an undivided interest in the retirement plans at the time that the fund was established, which was well before ERISA was passed in 1974, allowing ERISA to preempt her state created property right would violate the Fifth Amendment's prohibition against the government's taking private property without just compensation. Based upon the foregoing reasons;

IT IS ORDERED that Plaintiff's Motion for Summary Judgment, which seeks a declaration that ERISA preempts Louisiana's community property laws, be and is hereby DENIED.

IT IS FURTHER ORDERED that Judgment be and

is hereby rendered in favor of Defendants, DECLARING that ERISA does not preempt Louisiana's community property laws.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SANDRA JEAN BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

FILED
MAR 10 '94

JUDGMENT

For the reasons set out in this court's Minute Entry dated March 9, 1994;

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be entered herein in favor of Defendants, Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, and against Plaintiff, Sandra Jean Boggs, DECLARING that ERISA, 29 U.S.C. § 1001 *et seq.*, does not preempt Louisiana's community property law.

New Orleans, Louisiana, this 9th day of March, 1994.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY MAR 10 1994

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30178

FILED
APR 17 1996

SANDRA JEAN DALE BOGGS,
Plaintiff-Appellant,

VERSUS

THOMAS F. BOGGS, HARRY P. BOGGS
and DAVID B. BOGGS,
Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

Before WISDOM, KING, and DUHE', Circuit Judges.

WISDOM, Circuit Judge.

Sandra Boggs, the plaintiff/appellant, seeks a declaratory judgment that the Employee Retirement Income Act of 1974 (ERISA) preempts Louisiana community property law and, thereby, prevents the creation of a community property interest in ERISA-qualified retirement benefit plans. The district court rejected the plaintiff's contention and

denied her request for a declaratory judgment. We agree with the district court's decision. We AFFIRM.

I.

Isaac Boggs was employed by South Central Bell from June 18, 1949 until his retirement on September 1, 1985. As an employee, he participated in an ERISA-qualified pension plan. Isaac Boggs was married to his first wife, Dorothy Boggs, when he began employment with South Central Bell in 1949 and their marriage continued until her death on August 14, 1979. Dorothy and Isaac Boggs had three sons, David Bruce Boggs, Thomas Frank Boggs, and Harry Maurice Boggs, the defendant/appellees. Isaac Boggs married again in April of 1980. His second wife, Sandra Boggs, the plaintiff/appellant, survived her husband who died in 1989.

The South Central Bell plan provided for several types of retirement benefits. Upon his retirement, Isaac Boggs received a lump sum payment of $151,628.94 which was rolled over into an IRA account valued at $180,778.05 at his death. He was also paid a monthly annuity of $1,777.67. This benefit was converted into a survivor's annuity when Isaac Boggs died and is currently paid to Sandra Boggs. Isaac Boggs also received 96 shares of AT&T stock and a life insurance policy that names Sandra Boggs as beneficiary.

In her will, the first Mrs. Boggs bequeathed one-third of her estate and a lifetime usufruct in the remaining two-thirds to her husband. She designated her three sons as the owners of the naked or revisionary interest in the portion of her estate over which Isaac Boggs held a usufruct. Among

the assets listed in the succession of Dorothy Boggs was her community property interest in her husband's pension valued at $42,388.57 in 1979. The succession documents valued Dorothy Boggs' interest at $21,194.29.

The Boggs' sons, the defendants in this case, filed an action in Louisiana state court seeking an accounting of their father's usufruct and an award of some portion of the retirement benefits. Sandra Boggs then filed this case seeking a declaratory judgment that ERISA preempts the application of Louisiana community property law to this qualified plan. Specifically, the plaintiff, the second wife, argued that ERISA controls the disbursement of benefits and, under those rules, she is the designated beneficiary. The defendants responded by arguing that this case was not governed by ERISA and, therefore, the court lacked jurisdiction. In addition, the defendants argued that ERISA does not preempt Louisiana community property law. The district court responded by determining first that it had jurisdiction over the case under 29 U.S.C. section 1132. Further, the district court rejected the plaintiff's contention that ERISA preempts Louisiana community property law. The plaintiff asks us to review that decision.[1]

II.

Before we review the district court's determination regarding ERISA preemption, we must address the defendant's continuing contention that the district court lacked

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[1] The plaintiff also requests attorney's fees under 29 U.S.C. section 1132(g)(1) which allows the court to award ERISA beneficiaries, participants, and fiduciaries reasonable attorney's fees and costs when they are the prevailing party. Since we affirm the district court's denial of Sandra Boggs' request for a declaratory judgment, she is not entitled to attorney's fees.

jurisdiction to decide this case. 29 U.S.C. section 1132(a) creates ERISA jurisdiction and provides that:

> a civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan...".

In this case, Sandra Boggs, the plaintiff, is a beneficiary of the benefits plan; she is currently receiving a survivor's annuity. Further, she seeks to clarify her right to pension benefits under the South Central Bell plan. This type of action is expressly authorized by the jurisdictional provisions of section 1132 and the district court properly concluded that it had jurisdiction to resolve this case.

III.

The plaintiff, Sandra Boggs, seeks a declaratory judgment that ERISA preempts Louisiana community property law and, thereby, prevents the Boggs' children from receiving any portion of their father's pension benefits. The district court rejected the plaintiff's arguments and, on appeal, she asks us to reconsider the preemption issue. We review the district court's preemption analysis de novo.[2]

ERISA was enacted to protect the interests of the beneficiaries of employee benefit plans.[3] The Act "imposes

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[2] *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994).

[3] *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 137 (1990).

participation, funding, and vesting requirements on pension plans" and also regulates issues such as "reporting, disclosure, and fiduciary responsibility".[4] One important goal of ERISA is to impose uniform standards on plan administrators. Congress attempted to guarantee uniformity when it included ERISA's broad preemption provision.[5] 29 U.S.C. section 1144 (a) provides that the provisions of ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)".

This provision has been interpreted broadly. Courts recognize the " 'deliberately expansive' language chosen by Congress".[6] Thus, any state law which "relates to" an ERISA-qualified employee benefits plan is preempted. A state law "relates to" and ERISA plan "in the normal sense of the phrase, if it has connection with or reference to such a plan".[7] A state law can relate to an employee benefit plan even if it is not designed to regulate in the area of employee benefits or if its effect is indirect.[8]

The broad sweep of the ERISA preemption provision, however is not without limits.[9] The language of the statute

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[4] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983).

[5] *Ingersoll-Rand Company*, 498 U.S. at 137.

[6] *Hook*, 38 F.3d at 781.

[7] *Shaw*, 463 U.S. at 96-97.

[8] *Rozzell v. Security Services, Inc.*, 38 F.3d 819, 821 (5th Cir. 1994) (citing *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987)).

[9] *Ingersoll-Rand Company*, 498 U.S. at 139; *see e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988).

indicates that it preempts only state laws which relate to a benefit plan. Further, we must recognize the general presumption "that Congress does not intend to preempt areas of traditional state regulation".[10] The Supreme Court has warned that, in determining the scope of ERISA's preemption provision, we must be mindful of traditional principles of federalism.[11] "[W]e must be guided by respect for the separate spheres of governmental authority preserved in our federalist system."[12] For example, in *Mackey v. Lanier Collection Agency,* the Supreme Court held that a Georgia statute governing garnishment procedures in that state was not preempted by ERISA even when it was used to garnish benefits received under an ERISA plan.[13]

To determine whether ERISA preempts state law, this Court engages in a two-part analysis. First, we are less likely to find preemption when the state law at issue "involves an exercise of traditional state authority".[14] Second, we consider whether the state law "affects relations among the principal ERISA entities— the employer, the plan, the plan fiduciaries, and the beneficiaries" or whether it only "affects

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[10] *FMC Corporation v. Holliday,* 498 U.S. 52, 62 (1990) (citing *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977)).

[11] *See Hook,* 38 F.3d at 781 (citing the Supreme Court's warnings regarding placing some limit on the reach of the ERISA preemption provision in *Shaw v. Delta Airlines Inc.,* 463 U.S. 85 (1983) and *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981)).

[12] *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522 (1981).

[13] 486 U.S. 825 (1988).

[14] *Sommers Drug Stores v. Corrigan Enterprises, Inc.,* 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987), 479 U.S. 1089 (1987); *see also, Hook,* 38 F.3d at 781; *Memorial Hospital System v. Northbrook Life Insurance Company,* 904 F.2d 236, 245 (5th Cir. 1990).

relations between one of these entities and an outside party" or "two outside parties with only an incidental effect on the plan".[15]

In this case, the plaintiff asks us to conclude that ERISA preempts Louisiana community property law. The area of domestic relations has long been the domain of the states. As this Court has noted:

> Federal respect for state domestic relations law has a long and venerable history. When courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that state law should be given precedence . . . . The law of family relations has been a sacrosanct enclave, carefully protected against federal intrusion. One way our federalist system maintains the integrity of the folkways and mores of localities is through the conservation of state control over the creation and separation of families.[16]

A community property system governing the acquisition and ownership of property during marriage goes back to the earliest days of Louisiana as a French colony, and was carried on under the Spanish regime, and was embedded in the first Louisiana Constitution. It is an honored civilian institution, not the belated effort of a common law state to seek a tax advantage. The use of a community property system

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[15] *Sommers Drug Stores,* 793 F.2d at 1467, *see also, Hook,* 38 F.3d at 781; *Memorial Hospital,* 904 F.2d at 245.

[16] *Brandon v. Travelers Insurance Company,* 18 F.3d 1321, 1326 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 732, 130 L.Ed. 2d 635 (1995) (engaging in the ERISA preemption analysis).

represents Louisiana's recognition of the value a spouse, though non-employed, contributes to a marriage. The system conceives of marriage as a partnership in which each partner is entitled to an equal share.

Under Louisiana community property law, each spouse owns "a present undivided one-half interest" in all community assets, which vests from the moment of acquisition.[17] Pension benefits, if acquired during the marriage, are generally considered a community asset.[18] Thus, if one spouse receives benefits from a pension plan, he or she must account to the other spouse for this benefit which vests equally in both spouses from the instant of acquisition.

The plaintiff contends that the broad sweep of ERISA acts to prevent the operation of Louisiana's marital property system and bans the enforcement of ownership rights granted by Louisiana law if those rights include an interest in employee benefits under an ERISA plan. We do not agree. A state community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators. The controversy in this case is between successive spousess and their heirs. The focus of this case is not the relationship between the administrator of this ERISA plan and its beneficiaray. "ERISA's preemptive scope may be broad but it does not reach claims that do not involve the administration of plans, even though the plan may be a party to a suit or the claim relies on the details of the

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17 *Hare v. Hodgins*, 586 So. 2d 118, 122 (La. 1991).

18 *Id.*

plan".[19] And, as we noted in the *Hook* decision:

> a preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction . . . . In other words, ERISA was meant to consume everything in its path.[20]

This Court concludes that, under the facts of this case, the Louisiana community property law is not sufficiently "related to" an employee benefit plan to necessitate ERISA preemption. Nothing is sought from the plan or its fiduciary. No duty will be imposed on the plan or the administrator. Benefits will continue to be paid to the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects employee benefit plans "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan".[21] Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary. This is no greater effect than the state's garnishment laws. *Mackey*, 486 U.S. 825 (1988).

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19 *Hook*, 38 F.3d at 784.

20 *Id.* at 786. (citations omitted).

21 *Shaw*, 463 U.S. at 100 n.21. The dissent suggests that our decision today will create uncertainty regarding whether plan participants will actually receive their anticipated retirement income. The issue here, however, is not whether Isaac Boggs was entitled to his benefits as against the plan administrators, but whether, once received, he owed any of those benefits to the estate of his deceased spouse based on their thirty year marriage.

The plaintiff attempts to rely on two additional statutory sources to support her contention that Louisiana community property law has been displaced. First, she cites ERISA's spendthrift provision which prohibits the assignment or alienation of plan benefits.[22] She also cites 26 U.S.C. section 408, enacted as part of ERISA, which defines an IRA as a trust held by the United States for the benefit of the employee "without regard to any community property laws".[23] First, it is important to note that neither provision can substitute for an analysis under the general preemption provision. Section 1144 (a) carries out the power of Congress to preempt and it controls any determination of the boundaries of ERISA preemption. With this in mind, we examine the individual statutes cited and determine what impact, if any, they have on the operation of Louisiana community property law.

The purpose of the spendthrift provision is to prevent plan participants from recklessly divesting themselves of plan benefits before retirement. This provision was not intended to affect support obligations among the members of a family. Furthermore, a non-participant spouse's ownership of an interest in the participant spouse's retirement benefits involves neither an alienation nor an assignment. Under

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[22] 29 U.S.C. section 1056 (d) (1).

[23] 26 U.S.C. section 408 provides in pertinent part:

> (a) . . . For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . .
>
> (g) . . . This section shall be applied without regard to any community property laws.

community property law, ownership vests immediately in the non-earning spouse, and no transaction is needed to convey ownership. Thus, no transaction prohibited by the ERISA spendthrift provision has occurred.

The plaintiff argues further that the bequest by Dorothy Boggs of a portion of her interest in the retirement benefits was an attempted alienation in violation of the spendthrift provision. We disagree. Dorothy Boggs held an ownership right in the pension. Her spouse, or his estate, owes her an obligation to account for her share of the pension. Once her estate received this benefit, her will operates to transfer ownership to her three sons. This final alienation, two steps removed from the disbursement of benefits, is not a violation of the provisions of ERISA. ERISA "is concerned not so much with what the beneficiary does with his pension checks or how they are spent but with whether those in charge actually deliver the benefits".[24]

The plaintiff also relies on a Ninth Circuit Court case interpreting the spendthrift provision, *Albamis v. Roper*.[25] In that case, the Ninth Circuit Court determined, based almost exclusively on an analysis of this provision, that ERISA preempts California community property law.[26] The plaintiff asks this Court to adopt the reasoning of the *Albamis* court and hold that ERISA preempts Louisiana community property law. We cannot adopt the reasoning of the Ninth

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[24] *United Association of Journeymen v. Myers*, 488 F. Supp. 704, 712 (M.D. La. 1980), *affirmed by*, 645 F.2d 532 (5th Cir. 1981) (reviewing the legislative history of ERISA).

[25] 937 F.2d 1450 (9th Cir. 1991).

[26] *Id.*

Circuit Court because we feel their preemption analysis places too much emphasis on a broad interpretation of the spendthrift provision.

Finally, the plaintiff relies on 26 U.S.C. section 408. This provision governs the trust relationship between the government and the participant whose benefits are placed in an IRA account. It does not affect that participant's later obligation to his spouse to account for her portion of the benefits. This provision governing the disbursement of IRA funds cannot reasonably be interpreted to intervene in the marital relationship and divest one spouse of ownership rights.

IV.

The district court correctly concluded that ERISA, despite its exclusive control of benefits law and its broad preemption provision, does not preempt the community property laws created by the State of Louisiana. Accordingly, we AFFIRM.

KING, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that ERISA does not preempt the provisions of the Louisiana community property law that would operate here to divest a participant's widow of a portion of the benefits from pension plans that she would be entitled to receive under ERISA in favor of the heirs of his predeceased spouse. It defies reality to say that the widow's rights under ERISA have only been 'tenuously, remotely or peripherally' affected by Louisiana law. They have been gutted. I recognize that the preemption issue is conceptually as difficult as the bottom line is easy. But I am persuaded that the Ninth Circuit in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), and the Department of Labor in DOL Advisory Opinion # 90-46A (December 4, 1990) and in its excellent amicus brief submitted at our request have the better arguments. ERISA was enacted to protect the living - plan participants and their dependents - and it was amended in 1984 to protect divorced spouses of plan participants. Key objectives of the statute were to establish uniformity in the law nationwide and certainty in its application, objectives that are implemented in part by its preemption provision. Today's decision will create great uncertainty in the principal tenet of the statute that Congress strived to make certain: that a plan participant and his or her spouse will actually receive their anticipated retirement income.

APPENDIX C

26 U S C 408

§408: Individual retirement accounts.

(a) Individual retirement account. For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c). 403(a)(4), or 403(b)(8), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of $2,000 on behalf of any individual.

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the

entire interest of an individual for whose benefit the trust is maintained.

x x x

(g) Community property laws. This section shall be applied without regard to any community property laws.

APPENDIX D

29 U S C 1055

29 § 1055

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that—

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

(b) Applicable plans

(1) This section shall apply to—

(A) any defined benefit plan.

(d) **"Qualified and joint survivor annuity" defined**

For purposes of this section, the term "qualified joint and survivor annuity" means an annuity—

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the acturial equivalent of a single annuity for the life of the participant.

29 USC 1056

§ 1056 Form and payment of benefits

x x x

(a) — (c) omitted

(d) Assignment or alienation of plan benefits.
(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 [26 USCS §4975] (relating to tax on prohibited transactions) by reason of section

4975(d)(1) of such Code [26 USCS §4975(d)(1)]
(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a paraticipant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

29 USC 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—
(1) by a participant or beneficiary—
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

x x x x

29 USC 1132

(e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

29 USC 1144

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(c) Definitions. For purposes of this section:
(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

x x x

APPENDIX E

LOUISIANA CIVIL CODE

Art. 538. Usufruct of consumable things

If the things subject to the usufruct are consumables, the usufructuary becomes owner of them. He may consume, alienate, or encumber them as he sees fit. At the termination of the usufruct he is bound to pay to the naked owner either the value that the things had at the commencement of the usufruct or deliver to him things of the same quantity and quality.

Acts 1976, No. 103, § 1, eff. Jan. 1, 1977.

Art. 890. Usufruct of surviving spouse

If the deceased spouse is survived by descendants and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period.

The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over all or part of his separate property.

A usufruct authorized by this Article is to be treated as a legal usufruct and is not an impingement upon legitime.

If the usufruct authorized by this Article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse or affects separate property, security may be requested by the naked owner. Acts 1981, No. 911, § 1; Acts 1981, No. 919, eff. Jan. 1 1982; Amended by Acts 1982, No. 445 § 1; Acts 1990, No. 1075, § 1, eff. July 27, 1990.

LOUISIANA CIVIL CODE

Art. 2335. Classification of property

Property of married persons is either community or separate, except as provided in Article 2341.1.

Acts 1979, No. 709, § 1. Amended by Acts 1991, No. 329, § 1.

Art. 2336. Ownership of community property

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.

During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.

Acts 1979, No. 709, § 1. Amended by Acts 1981, No. 921, § 1; Acts 1982, No. 282, § 1.

Art. 2338. Community property

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with

community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Acts 1979, No. 709, § 1, eff. Jan. 1, 1980.

Art. 2369. Accounting between spouses; prescription

A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime.

The obligation to account prescribes in three years from the date of termination of the community property regime.

Acts 1979, No. 709, § 1, eff. Jan. 1, 1980.

APPENDIX F

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

DEC 4 1990 AO 90-46A

Ms. Ellen O. Pfaff
Lane Powell Moss & Miller
3800 Rainier Bank Tower
Seattle, Washington 98101-2647

Dear Ms. Pfaff:

This responds to your request for an advisory opinion, on behalf of the trustee of the Bruce A. Nordstrom Self-Employed Retirement Plan (Plan), concerning the application of sections 514 and 206(d) of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to the court order described below.[1] Your submission contains the following facts and representations.

The Plan is a tax-qualified retirement plan[2] under which benefits are payable upon the participant's retirement or death. The Plan provides that benefits may not be assigned or alienated except in the case of a "qualified domestic relations order." Bruce A. Nordstrom is a Plan participant whose

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[1] For convenience, this letter refers to the provisions of section 206(d) of ERISA rather than to the corresponding provisions in sections 401(a)(13)(B) and 414(p) of the Internal Revenue Code, to which your request refers.

[2] You indicated in a telephone conversation with a representative of this Office that the Plan has a number of participants and is covered by title I of ERISA.

benefit account is not in pay status.

Bruce Nordstrom's wife, Frances W. Nordstrom, died October 5, 1984. Her will was admitted to probate in the Superior Court for the State of Washington at King County (the Court). Subsequently, the estate of Frances Nordstrom (the Estate) filed a petition asking the Court to require the Plan to divide and segregate that portion of Bruce Nordstrom's benefits which represents the interest of the Estate. You indicate the request was made on the grounds that, *inter alia*, Frances Nordstrom owned at her death an undivided one-half community interest in Bruce Nordstrom's accrued benefits pursuant to the community property law of the State of Washington and that a court order for such division and segregation of benefits could issue in accordance with section 206(d)(3) of ERISA. The Court granted the petition and entered an order styled "Qualified Domestic Relations Order and Order Dividing Retirement Plan Benefits" (the Court Order).

You request the views of the Department of Labor concerning whether the community property law of the State of Washington is preempted by section 514 of ERISA and whether the Court Order falls within the scope of section 206(d)(3) of ERISA. Section 514(a) of ERISA generally preempts all state laws insofar as they relate to employee benefit plans covered by title I of ERISA. Therefore, a state community property law that considers the pension earned by a married spouse to be community property is preempted under this provision, unless some exception applies.

Section 514(b) of ERISA specifies certain exceptions from the broad preemptive effect of section 514(a). Of those exceptions, only that provided by section 514(b)(7) has relevance to community property laws. Section 514(b)(7) states that preemption under section 514(a) does not apply to "qualified domestic relations orders" within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(1) of ERISA generally requires pensions plans covered by title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a "domestic relations order," unless the order is determined to be a "qualified domestic relations order" (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms "qualified domestic relations order" and "domestic relations order" for purposes of section 206(d)(3) as follows:

> (B) For purposes of [section 206(d)(3)] —
>
> (i) the term "qualified domestic relations order" means a domestic relations order—
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of a subparagraphs (C) and (D) are met, and
>
> (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a *community property law*). (emphasis added)

The term "alternate payee" is defined by ERISA section 206(d) (3) (K) to mean "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

Section 514(b) (7) and 206(d) (3) of ERISA were enacted as part of the Retirement Equity Act of 1984 (REA), which aimed primarily at assuring greater and more equitable opportunity for women working as employees or homemakers to receive private pension income. The legislative history of the QDRO provisions of REA contains numerous statements indicating that Congress was focusing on the division of pension benefits in marital dissolution or dependant support situations. For example, Congressman William Clay described the QDRO provisions during a House floor debate on the legislation as follows:

> Finally, women may be denied their rights to pension benefits by the dissolution of a marriage by divorce, regardless of how many years she served as an economic partner to a man covered by a pension plan. Even in cases in which the State domestic relations court is willing to consider the pension an asset of the marriage and award the ex-

> wife a share of it, her rights have been thwarted. Pension plans have refused to honor those court orders claiming that they required an impermissible assignment of benefits and were preempted by ERISA.
>
> H.R. 4280 makes it clear that honoring a legitimate State court order awarding an ex-spouse some or all of a worker's pension does not violate the antiassignment clause of ERISA. In addition, the legislation creates an exception from ERISA's broad preemption of State laws for qualified domestic relations orders.[3]

Moreover, the report of the Senate Committee on Finance made specific mention of state community property laws in observing that "[s]everal cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (*e.g.*, alimony, separate maintenance, and child support obligations)."[4] The report noted "[t]here is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan,"[5] and cited two cases in which application of state community property law to pension benefits was at issue in the context of marital dissolution proceedings.[6]

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[3] 130 Cong. Rec. 13327 (1984).

[4] S. Rep. No. 575, 98th Cong., 2d Sess. 18 (1984).

[5] *Id.* 19.

[6] The cases cited were *Stone* v. *Stone*, 632 F. 2d 740 (9th Cir. 1980) and *Francis* v. *United Technology Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

It thus appears Congress generally intended that the QDRO provisions of ERISA would have application in those court proceedings conducted primarily to resolve domestic relations issues. With respect to ERISA section 206(d) (3) (B) (ii) (II), it is the view of the Department of Labor that Congress intended the QDRO provisions to encompass state community property laws only insofar as such laws would ordinarily be recognized by courts in determining alimony, property settlement and similar orders issued in domestic relations proceedings. We find no indication Congress contemplated that the QDRO provisions would serve as a mechanism in which a non-participant spouse's interest derived only from state property law could be enforced against a pension plan.

In the case at hand, the Court Order was issued in a probate proceeding and would recognize an interest in pension benefits of the surviving spouse solely on the basis of the state community propery law. Consistent with the view discussed above, it is the opinion of the Department of Labor that the Court Order is not a "domestic relations order" within the meaning of section 206(d) (3) (B) (ii) of ERISA and, therefore, does not constitute a QDRO for purposes of sections 206(d) (3) and 514(b) (7) of ERISA. Accordingly, it is the opinion of the Department of Labor that the Court Order is unenforceable against the Plan.

This letter constitutes an advisory opinion under ERISA procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations